

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

60501

FILE: B-182355

DATE: February 11, 1976

MATTER OF: Richard T. D'Ambrosia d.b.a. Ambrosia  
Construction Company

98625

## DIGEST:

1. Where it was determined that contractor had underpaid three employees in violation of Davis-Bacon Act, 40 U.S.C. § 276a (1970), and funds were administratively withheld from balance due on contract to cover underpayments, claims of underpaid workers have priority over later IRS levy. 46 Comp. Gen. 178 (1966), which held that IRS levy had priority over claims of underpaid employees, is modified to extent that it is inconsistent.
2. Bank claiming balance due under contract on basis of assignment from contractor does not have valid claim against Government since assignment was not made pursuant to Assignment of Claims Act, 31 U.S.C. § 203 and 41 U.S.C. § 15. Distribution of contract balance, withheld to cover Davis-Bacon underpayments, is authorized. But due to lapse of time since violations occurred and bankruptcy of contractor, debarment is not warranted.

The present case involves the question of who has priority to funds withheld to cover underpayments of workers as a result of violations of the Davis-Bacon Act, 40 U.S.C. § 276a, by Richard T. D'Ambrosia d.b.a. Ambrosia Construction Company, incident to its performance of Department of Navy Contract N62464-67-C-0410, for the installation of a sprinkler system in Building No. 42, Naval Station, Boston, Massachusetts.

The contract was awarded on June 29, 1967, and included the labor standards provisions of Standard Form 19-A (including the Davis-Bacon provisions) and the Secretary of Labor's Wage Decision No. AG-9,870, dated April 9, 1967, as modified on April 24, 1967. During the performance of the contract it was determined by the Navy that three workers had been underpaid a total of \$2,440.53. This amount, in addition to an amount covering liquidated damages, was withheld, from the amount due the contractor under the contract, some time prior to July 8, 1969, the date on which the contract was completed. However, the money was not forwarded to the General

Accounting Office (GAO) until March 1974, for reasons which will be explained later.

On November 13, 1969, the contractor filed a petition in bankruptcy in the United States District Court for the District of Massachusetts. The petition of July 16, 1970, to establish title and for turnover to the Referee in Bankruptcy indicates that there was a contract balance of \$8,000, which we assume included the withholdings of \$2,440.53 covering Davis-Bacon violations, \$3,840 for liquidated damages, leaving \$1,719.47. However, according to the Resident Officer in Charge of Construction at the Boston Naval Shipyard, the amount due on the contract was \$7,886.28 minus \$2,441.53 (correct amount was \$2,440.53) for the wage underpayments and \$3,840.00 covering liquidated damages, leaving a contract balance of \$1,604.75. The petition also indicated that the Rockland Trust Company had asserted a claim against the contract balance. Due to the inability of the parties involved to agree on a hearing date and to obtain a decision on the claims of the creditors, the Resident Officer in Charge of Construction, Boston Naval Shipyard, recommended, on May 4, 1971, that the money withheld by the Navy to cover Davis-Bacon violations be transmitted to GAO for disbursement to the underpaid workers. On June 16, 1971, the Internal Revenue Service (IRS) asserted a claim of \$98,375.01 against the contract balance. According to the record, there followed a lengthy legal battle involving the various creditors, the Rockland Trust Company, the Navy and the IRS over the division of the bankrupt's assets. On March 7, 1974, the \$2,440.53 was finally forwarded to GAO.

The only question which is before us is which party (IRS, the Rockland Trust Company and the underpaid workers) has priority to the \$2,440.53, against which no other claims have been asserted.

Regarding the claim by the Rockland Trust Company, set out in the petition of July 16, 1970, to the Bankruptcy Court, it appears to be based on an alleged assignment by the contractor to the bank of amounts owed it (the contractor) under the contract. However, there is no evidence of record to indicate that an assignment exists under the Assignment of Claims Act, 31 U.S.C. § 203 (1970). This being the case, its claim while effective between the parties would not be valid against the Government. B-176890, April 18, 1973.

In regard to IRS' claim and the underpaid workers' claims, we recognize that the Government, in this case the IRS, has the common law right of setoff against amounts owed the contractor by the Government. United States v. Munsey Trust Co., 332 U.S. 234 (1957). However, the courts have held that IRS levies cannot attach to property in which the taxpayer has no interest. See Atlantic Refining Company v. Continental Casualty Company, 183 F. Supp. 478 (1960), United States v. Burgo, 175 F.2d 196, 198 (1949). The reason for this is that the Government's rights under sections 6321 and 6322 of title 26 of the U.S.C. (the statutory authority for IRS liens) can rise no higher than the rights of the taxpayer. Central Surety and Insurance Corporation v. Martin Infante Co., Inc., 272 F.2d 231 (1959). The issue which must therefore be resolved is whether or not the contractor had, at the time of the IRS levy, an interest in the withheld funds against which the IRS levy could attach.

The Davis-Bacon Act, at 40 U.S.C. § 276a(a), provides that:

"\* \* \* there may be withheld from the contractor so much of the accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, sub-contractors, or their agents." (Emphasis supplied.)

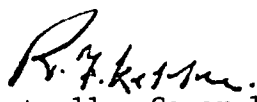
Also, 40 U.S.C. § 276a-2(a), authorizes the Comptroller General "to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics \* \* \*" (Emphasis added.) However, once the money is withheld and segregated by the contracting officer for the specific purpose of covering alleged Davis-Bacon underpayments, the contractor has no interest in those monies to which an IRS levy can attach. Since the rights of IRS can rise no higher than the

contractor's rights, IRS' right to the money would only be a contingent right to the fund should the Comptroller General determine that the contractor was entitled to the withheld monies. Certainly, where there is no IRS levy the contractor would have no right to the money between the time it was withheld by the contracting officer and the time the Comptroller General makes his preliminary determination and, additionally, if the Comptroller General made a determination that the workers were, in fact, underpaid, the contractor would be totally divested of any right to the money. Since IRS "stands in the contractor's shoes," so to speak, it (IRS) would not have priority to the withheld funds over the underpaid workers should the Comptroller General determine that the workers had been underpaid.

Additionally, we believe that to give IRS priority to funds withheld for the specific purpose of paying workers, who have been underpaid in violation of the Davis-Bacon Act, would be contrary to the intent of the Act, i.e., to protect the employees from substandard earnings by fixing a wage floor under Government projects. See United States v. Binghamton Construction Co., Inc., 347 U.S. 171 (1954). To rule otherwise would permit IRS to effectively defeat the purpose of the Act by allowing it to set off against the funds before the Comptroller General makes his preliminary determination of who is entitled to the money. The reason for this is that in most, if not all, instances by the time the Comptroller General had made his preliminary determination IRS would have already issued its levy and setoff against the funds, thus, leaving the Comptroller General with no funds with which to pay the workers should he decide that they were, in fact, underpaid. This unfortunate result is due to the delay caused by the various administrative proceedings between the time the money is withheld and the time that the funds are received by GAO.

Accordingly, 46 Comp. Gen. 178 (1966) is modified to the extent that it is inconsistent with our holding in the present case. Our Claims Division has been authorized to distribute the \$2,440.53 to the underpaid workers.

Regarding the question of debarment of the contractor for violation of the Davis-Bacon Act (see 40 U.S.C. § 276a-2(a)), in view of the fact the contractor is bankrupt and the lapse of time since the violations occurred we are of the view that debarment would be inappropriate.

  
Deputy Comptroller General  
of the United States